Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-01-29-94
GOPAL SRI RAM, NH CHAN AND SITI NORMA YAAKOB JJCA
18 NOVEMBER 1995

Contract *— Undue influence — Sublease and sale of land — Whether respondent in position to dominate will of appellants — Whether independent legal advice received — Whether parties on equal footing — Contracts Act 1950 s 16*

Civil Procedure *— Pleadings — Striking out — Statement of claim — General principles — Whether statement of claim frivolous and vexatious and an abuse of the process of court — Rules of the High Court 1980 O 18 r 19*

Land Law *— Restriction — Certain clause in Land Regulations prohibited dealing with non-native — A copy of Land Regulations attached to title — Land Regulations repealed — Whether clause was just another condition to title — Whether clause could be deleted if successors in title consented — Land Regulations of British North Borneo 1894*

The appellants, who were twin brothers, inherited 3,835 acres of land in Karambunai, Sabah ('the land') from their mother and grandmother when they were still infants. A restriction existed in the title of the land, in that a copy of the Land Regulations of British North Borneo 1894 ('the 1894 Regulations') containing a clause ('cl 20) which forbade any dealing on the land with non-natives, was attached to the title. However, when the appellants reached 16 years of age in 1982, they signed a memorandum of intent ('the memorandum') with the first respondent to grant it a 99-year lease over 1,500 acres of the land. The appellants' father and Pengiran Othman, ie their relative and the then Minister of Federal Territory, acted as their legal representatives. In October 1982, the third respondent, who was the managing director of the first and third respondents company, had paid various sums to the appellants in compliance with the memorandum, including the estate duty leviable on the land which had not been settled by the appellants. In 1984, the appellants who had attained 18 years of age excecuted an agreement ('the first agreement') which contained almost similar terms as contained in the memorandum. Being aware that subleasing was prohibited by cl 20 of the 1894 Regulations, the appellant applied to amend the title by deleting cl 20 of the annexure. On 3 December 1984, the pengarah Tanah dan Ukur, Sabah ('the fourth respondent') deleted cl 20 and registered the amendment. In the same year, the appellants executed a second agreement with the first respondent to replace the first agreement. Under the second agreement, the rental to be paid to the appellants for the sublease was

fixed at RM22.5m for the duration of the lease period. It was to be settled by the first respondent by alloting 9m shares of its company to the appellants. This allotment, however, never took place, but instead a purported transfer of the shares was made to the appellants who, in turn, executed a trust deed with the second respondent wherein the appellants acknowledged that they held the shares as trustees for the second respondent. It was agreed that the balance of the rental amounting to RM13.5m was to be settled by the second respondent through the creation of another trust, and by instalments on terms and conditions specifically set out in the second agreement. Between 1987 and 1991, substantial sums of money were advanced by the third respondent to the appellants for their education and maintenance, and they were set off as rental due under the sublease. In 1991, the appellants entered into another agreement with the first respondent. This time, 600 acres of land was sold, and another 1,781 acres was leased for 99 years to the first respondent. The consideration of RM4.8m was fully paid by the first respondent. As at April 1994, the appellants were only beneficially entitled to 500 acres, the remaining areas having either been sold or subleased to the first respondent. The appellants contended that they only became aware of the implications of the agreements that they had executed when the first respondent sought a declaration from the court that the bulk of the land had become its property. The appellants sought a rescission of all the agreements and the trust deed, and a declaration that they were all void and invalid on the grounds: (i) that the appellants had been unduly influenced by the third respondent to enter into the various agreements with the first respondent without consideration; and (ii) that the deletion of cl 20 of the 1894 Regulations was ultra vires the powers of the fourth respondent. They also sought an order to expunge the memoranda of sublease and transfer from the register, and to reinstate cl 20. The High Court allowed the respondent's application to strike out the appellants' action under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') on the grounds that the appellants' statement of claim disclosed no reasonable cause of action, was frivolous, vexatious, and an abuse of the process of court. The appellants appealed.

Held, dismissing the appeal:

(1) The discretionary power to dismiss an action summarily under O 18 r 19 of the RHC and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases. When a case is argued on the affidavit evidence available, it must become plain and obvious that the case has no chance of success (see p 320I); *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1 and *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890 followed.

(2) When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. Where the affidavit evidence discloses a dispute of facts, such facts must be analysed, and if they are found to be inconsistent with the undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence (see p 321B); *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 followed.

(3) The doctrine of undue influence was to save persons from being forced, tricked or misled in anyway by others into parting with their property. In the light of the documentary evidence, it could not be said that the appellants had been denied of any independent legal advice when they executed the various agreements. They executed the agreements freely. They had not been rushed into executing the agreements within a limited period of time (see pp 322C and 326D).

(4) The memorandum was nothing more than an expression of the intentions of the parties to enter into a contractual relationship. From the outset, the parties were on equal footing and there was therefore no question of one party dominating the will of the other. The fact that the land was burdened with an estate duty debt which was eventually settled by the third respondent did not characterize him as the superior person with a dominating will. Furthermore, with each agreement executed, the appellants had been compensated either in cash or in kind, ie good consideration had been given (see p 326E–I).

(5) The restriction placed by cl 20 of the 1894 Regulations was not incorporated as a numbered condition in the title itself, but that the whole of the 1894 Regulations was attached to the title. Since the 1894 Regulations had been repealed, the reference to cl 20 in the title could only mean that it was intended to be just another condition to the title. That being so, it could be deleted by the consent of the parties to the lease who were the successors in title, and such consent empowered the fourth respondent to effect the deletion of cl 20. Accordingly, the respondents had no case to answer (see p 329).

[Bahasa Malaysia summary

Perayu-perayu, yang merupakan adik beradik kembar, mewarisi 3,835 ekar tanah di Karambunai, Sabah ('tanah tersebut') daripada ibu and nenek mereka semasa mereka masih kecil lagi. Suatu sekatan wujud dalam tanah tersebut, iaitu sesalinan Peraturan Tanah British North Borneo 1894 (Land Regulations of British North Borneo

1894) ('Peraturan 1894'), yang mengandungi suatu fasal ('fasal 20') yang menghalang sebarang urus niaga atas tanah tersebut dengan bukan penduduk asal, telah dilampirkan kepada hakmilik tanah. Walau bagaimanapun, apabila perayu-perayu mencapai 16 tahun pada 1982, mereka telah menandatangani suatu memorandum niat dengan penentang pertama untuk memberikannya suatu pajakan selama 99 tahun terhadap 1,500 ekar daripada tanah tersebut untuk tujuan pembangunan. Ayah perayu dan Pengiran Othman, iaitu saudara mereka dan Menteri Wilayah Persekutuan pada masa itu, menjadi wakil undang-undang mereka. Pada Oktober 1982, penentang ketiga, yang merupakan pengarah mengurus syarikat penentang pertama dan ketiga, telah membayar beberapa bayaran kepada perayu-perayu mengikut memorandum tersebut, termasuk duti harta pusaka yang dikenakan ke atas tanah tetapi belum diselesaikan oleh perayu-perayu. Pada 1984, perayu-perayu yang telah mencapai 18 tahun telah menyempurnakan suatu perjanjian ('perjanjian pertama') yang mengandungi terma yang lebih kurang sama dengan memorandum. Menyedari bahawa subpajak adalah dilarang oleh fasal 20 Peraturan 1894, perayu telah memohon untuk meminda hakmilik itu dengan memotong fasal 20 lampiran tersebut. Pada 3 Disember 1984, pengarah Tanah dan Ukur, Sabah ('penentang keempat') telah memotong fasal 20 dan mendaftarkan pemindaan itu. Dalam tahun yang sama, prayu-perayu telah mengikat perjanjian yang kedua dengan penentang pertama untuk menggantikan perjanjian pertama. Di bawah perjanjian kedua, sewa yang harus dibayar kepada perayu-perayu untuk subpajak telah ditetapkan pada RM22.5 juta untuk tempoh pajakan. Ia harus diselesaikan oleh penentang pertama dengan pengumpukan 9 juta syer syarikatnya kepada penentang, Pengumpukan ini, walau bagaimanapun, tidak berlaku, tetapi sebaliknya suatu urus niaga yang dikatakan sebagai pindahmilik syer telah dibuat kepada perayu, yang kemudiannya, menyempurnakan suatu suratikatan amanah dengan penentang kedua dalam mana perayu telah mengaku bahawa mereka memegang syer tersebut sebagai pemegang amanah penentang kedua. Adalah dipersetujui bahawa baki sewa berjumlah RM13.5 juta harus diselesaikan oleh penentang kedua melalui penubuhan suatu amanah yang lain, dan melalui ansuran atas terma dan syarat yang telah dibentangkan dalam perjanjian kedua secara spesifik. Antara 1987 dengan 1991, jumlah wang pendahuluan yang cukup banyak telah diberikan oleh penentang ketiga kepada perayu untuk pelajaran dan untuk menanggung dan untuk tolakan sebagai sewa yang terhutang di bawah subpajak. Pada 1991, perayu telah mengikat suatu lagi perjanjian dengan penentang pertama. Kali ini, 600 ekar daripada tanah tersebut telah dijual, dan 1781 ekar daripada tanah tersebut telah dipajak selama 99 years kepada penentang pertama. Balasan sejumlah RM4.8 juta telah dibayar dengan penuh oleh penentang pertama. Pada April 1994, perayu-perayu hanya berhak secara benefisial terhadap 500 ekar, yang baki telah sama ada dijual ataupun disubpajak kepada penentang

pertama. Perayu-perayu berhujah bahawa mereka hanya menyedari implikasi perjanjian yang telah mereka sempurnakan itu selepas penentang pertama memohon suatu deklarasi daripada mahkamah bahawa sebahagian besar daripada tanah tersebut telah menjadi harta penentang pertama. Perayu memohon untuk pembatalan kesemua perjanjian dan suratikatan amanah, dan suatu deklarasi bahawa perjanjian dan suratikatan tersebut adalah batal dan tak sah atas alasan: (i) bahawa perayu telah dipengaruhi secara tak wajar oleh penentang ketiga untuk mengikat pelbagai perjanjian dengan penentang pertama tanpa balasan; dan (ii) bahawa pemotongan fasal 20 Peraturan 1894 adalah ultra vires kuasa penentang keeempat. Mereka juga telah memohon untuk suatu perintah untuk memadamkan memoranda subpajak dan pindahmilik daripada daftar, dan penghidupan kembali fasal 20. Mahkamah Tinggi membenarkan permohonan penentang untuk membatalkan tindakan peryu-perayu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa pernyataan tuntutan perayu tidak mendedahkan kausa tindakan yang munasabah, adalah remeh, menyusahkan, dan merupakan suatu penyalahgunaan proses mahkamah. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Kuasa budi bicara untuk menolak suatu tindakan secara terus di bawah A 18 k 19 KMT dan di bawah bidang kuasa sedia ada mahkamah merupakan suatu kuasa yang drastik yang hanya patut digunakan dalam kes yang jelas dan nyata, iaitu apabila kes dihujahkan atas keterangan afidavit yang ada, adalah jelas dan nyata bahawa kes terdapat tidak mempunyai peluang untuk berjaya (lihat ms 320I); *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1 dan *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890 diikut.

(2) Apabila suatu soalan undang-undang menjadi suatu isu, ini dengan sendirinya tidak akan menghalang mahkamah untuk membenarkan permohonan, kerana selagi mahkamah berpuas hati bahawa isu undang-undang tersebut adalah tidak boleh dihujahkan atau tidak boleh dikekalkan, ia boleh memutuskan soalan tersebut. Jika keterangan afidavit mendedahkan suatu pertikaian fakta, fakta tersebut hendaklah dianalisa, dan jika didapati bahawa fakta tersebut tidak konsisten dengan dokumen kontemporari yang tidak dipertikaikan atau fakta tersebut memang tidak mungkin, mahkamah berhak menolak fakta tersebut dan bertindak atas keterangan dokumentar kontemporari yang tidak dipertikaikan (lihat ms 321B) *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 diikut.

(3) Doktrin pengaruh tak wajar adalah bertujuan untuk menyelamatkan seseorang daripada dipaksa, ditipu atau diperdaya

melalui apa-apa cara oleh orang lain untuk meninggalkan hartanya. Berdasarkan keterangan dokumentar, tidak boleh dikatakan bahawa perayu telah dinafikan sebarang nasihat undang-undang yang bebas apabila mereka menyempurnakan pelbagai perjanjian itu. Mereka telah menyempurnakan perjanjian secara bebas. Mereka tidak digesa untuk menyempurnakan perjanjian tersebut dalam suatu tempoh masa yang terhad (lihat ms 322C dan 326D).

(4) Memorandum niat yang berkenaan ialah sekadar suatu penyataan niat pihak-pihak tersebut untuk mengikat suatu perhubungan kontrak. Sejak awal, pihak-pihak tersebut adalah setanding dan tidak terdapat soalan bahawa suatu pihak menguasai kehendak hati pihak yang satu lagi. Fakta bahawa tanah tersebut dibeban dengan suatu hutang duti harta pusaka yang akhirnya dibayar oleh penentang ketiga tidak memberi gambaran bahawa dia ialah seorang yang lebih unggul dengan tekad untuk menguasai. Lagipun, dengan penyempurnaan setiap perjanjian, perayu-perayu telah diberi pampasan sama ada dalam bentuk wang atau bentuk lain, iaitu balasan yang sah telah diberi (lihat ms 326E–I).

(5) Sekatan yang diletakkan oleh fasal 20 Peraturan 1894 tidak dimasukkan sebagai suatu syarat yang bernombor dalam hakmilik itu sendiri, tetapi seluruh Peraturan 1894 telah dilampirkan kepada hakmilik. Oleh kerana Peraturan 1894 telah dimansuhkan, rujukan kepada fasal 20 dalam hakmilik hanya bermaksud bahawa ia diniatkan sebagai satu lagi syarat kepada hakmilik tersebut. Maka, ia boleh dipotong melalui persetujuan pihak-pihak kepada pajakan yang merupakan pengganti hakmilik, dan persetujuan sedemikian telah memberikan penentang keempat kuasa untuk melaksanakan pemotongan fasal 20. Oleh yang demikian penentang-penentang tidak ada kes untuk dijawab (lihat ms 329).]

[*Editorial Note*: The appellants' application for leave to appeal to the Federal Court has been dismissed.]

Notes

For cases on undue influence, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2281–2290.

For cases on striking out of pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2649–2769.

Cases referred to

Allcard v Skinner (1887) 36 Ch D 145

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400

Mckay & Anor v Essex Area Health Authority & Anor [1982] QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890

Tractors (M) Bhd v Tio Chee Hing [1975] 2 MLJ 1

Legislation referred to

Contracts Act 1950 s 16
Land Ordinance 1930 s 17(i)
Land Regulations of British North Borneo 1894 Pts I, II, III cll 20, 21
Ordinance 7 of 1913 ss 28, 29
Proclamation No III of 1894
Proclamation No XXIII of 1903 ss 26, 27
Sabah Land Ordinance (Sabah Cap 68) ss 17, 88
Rules of the High Court 1980 O 18 rr 12(1)(a), 19(1)(a), (b), (d)

Appeal from: Civil Suit No K22–85 of 1994 (High Court, Kota Kinabalu)

Tun Salleh Abas, Yaacob H Merican and *Jonathan Yasin* (*Ansari & Co*) for the appellants.
Marina Tin (*Yap Chin & Tiu*) for the first, second and third respondents.
Juprin Wong Adamal (Peguam Kanan Negeri) for the fourth respondent.

Cur Adv Vult

Siti Norma Yaakob JCA (delivering the judgment of the court): We had dismissed this appeal with costs and we now give our reasons for having decided so.

The appellants (the plaintiffs in the court below) are twin brothers and are the sons of Pengiran Mohd Yusoff bin Pengiran Abdul Razak, deceased, and Pengiran Siti Alimah bte Datu Hussein, deceased. The appellants were born on 7 February 1966, and it was on that day too that they lost their mother and inherited her ½ undivided share in a leasehold comprised in country lease No 04509117 situated in the district of Kota Kinabalu, Sabah. Together with the other ½ undivided share which forms part of the estate of Pengiran Siti Hapsah bte Pengiran Mohd Salleh, the appellants' grandmother who died on 1 August 1978, the two parcels of land, covering an area of 3,835 acres more or less, form the subject matter of the dispute in these proceedings. We shall refer to these lands as the Karambunai land. Attached to the title is a copy of the Land Regulations of British North Borneo 1894 ('the 1894 Regulations') of which cl 20 forbids any dealing on the land with non-natives.

With that restriction in the title, the Karambunai land had remained with the family of the appellants until 1984 when a number of transactions affecting the land dating from 1984–1992, were entered into by the appellants with the first to the third respondents with the result that the appellants are now beneficially entitled to only 500 acres, whilst the main bulk of 2,735 acres have either been sold or subleased to the first and second respondents with the balance compulsorily acquired by the federal government. It is to question the validity of the transactions relating to the

sale and subleases that proceedings were first commenced in the High Court at Kota Kinabalu. The fourth respondent is made a party as the appellants question his powers to amend the title, and additionally, as the authority who registered the sale and subleases of the bulk of the Karambunai land to the first and second respondents, the appellants consider him a necessary party to give effect to the different prayers that they seek in their amended statement of claim.

It is not disputed that prior to his death on 28 August 1989, Pengiran Mohd Yussof bin Pengiran Abdul Razak ('the appellants' father') had every intention to reap the utmost benefit from the Karambunai land by developing it into a housing and commercial project. However, there were two obstacles that stood in the way of his objective. The first is that although the appellants are the direct beneficiaries to the Karambunai land by way of inheriting it through their mother's and grandmother's estates, the land could not be vested to them wholly, as the estate duty due on their mother's estate had not been settled. Both estates were initially managed by the public trustee, and as at 14 October 1982, the duty leviable on the estate of the appellants' mother was RM365,160.91.

The second obstacle was that the appellants' father needed a financier for his ambitious project. For that purpose and through the good offices of a relative, the then Minister of Federal Territories, Datuk Pengiran Othman Rauf @ Awang ('Pengiran Othman'), the appellants' father befriended the third respondent, the managing director of the first and second respondents. Thus, any reference to the third respondent in this judgment includes the first and second respondents as well and vice versa. That was in 1982 and it was through this contact and the friendship that followed that two important events took place in the same year.

The first is the execution of a memorandum of intent dated 27 August 1982, by the appellants' father, Pengiran Othman and the appellants, on the one hand, and the first respondent, on the other. In this transaction, the appellants' father and Pengiran Othman acted as the legal representatives of the appellants as the latter were only 16 years old then.

Under the memorandum, the appellants together with their legal representatives, agreed to grant the first respondent a 99-year lease over 1,500 acres of the Karambunai land ('the leased land') for the purpose of developing the area into four specific projects, namely, housing, commercial, industrial and tourism, to be undertaken by the first respondent on a joint venture basis with the appellants. In return, the appellants were to be paid varying amounts of fixed rates of rental per acre per annum for the different types of project undertaken. Additionally, the first respondent also agreed to effect settlement of the estate duty due on their mother's estate as well as provide financial loans and advancement of rental to the appellants for their education whenever necessary.

The settlement of estate duty was done through a letter dated 14 October 1982, written by Messrs Skinner, Lind Robertson, Pang & Willie, the appellants' then solicitors, to the public trustee, enclosing the amount of RM365,160.71 being the amount of estate duty due on their

A mother's estate. This enabled the asset of their mother's estate, this being the ½ undivided share in the Karambunai land, to be vested in the appellants. It is also not disputed that apart from remitting the estate duty, the third respondent also paid out various sums totalling RM111,460 to the appellants from March 1983 to March 1984 in compliance with the memorandum.

B

The appellants attained 18 years of age on 7 February 1984, and a month after that, they confirmed the memorandum of intent by executing the first of many agreements with the first respondent containing almost similar terms to what had been previously agreed upon under the memorandum. This agreement dated 8 March 1984 is referred to as the

C first agreement.

The appellants were all too aware that subleasing part of the Karambunai land to the first respondent is prohibited by cl 20 of the 1894 Regulations which is attached to the title. To circumvent this and to fulfil their other obligations under the first agreement, particularly cl 2, which

D obliged the appellants to seek a partitioning and the issue of separate documents of title in respect of the leased land and the balance portion of the land, the appellants applied through Dato Harris Salleh, the then Chief Minister of Sabah, on 10 September 1984, to delete cl 20 of Pt III of the annexure to the deed of lease. With the consent of the public trustee, who

E was administering the estate of the appellants' grandmother, the fourth respondent amended the title by deleting the provisions of cl 20 and registered such amendment and deletion on 3 December 1984. It is interesting to note that even before this deletion took place, a memorandum of sublease dated 18 September 1984 was registered at the central Land Registry, Kota Kinabalu, on 24 November 1984. There is also evidence

F that in 1985, the first respondent created three charges on the sublease to secure loans totalling RM31m granted by Kewangan Usaha Bersatu Bhd to Everwrite Management Sdn Bhd, a company controlled by the third respondent.

The first agreement was shortlived as it was replaced on 18 October

G 1984, by a second agreement executed by the appellants with the first and second respondents. This replacement became necessary when the state government of Sabah threatened to acquire the leased land through the Sabah Economic Development Corporation if the appellants and the first respondent did not execute a fresh joint venture agreement based on terms

H and conditions as put forward by the government. Under this second agreement, the intention to have the 1,500 acres of the Karambunai land subleased to the first respondent for a period of 99 years is maintained but the rental to be paid to the appellants have been fixed at RM22.5m for the duration of the leased period. This was to be settled by the first respondent issuing and allotting to the appellants nine million of its shares at RM1

I each credited as fully paid and this would be offset against the rental payable under the agreement. This allotment, however, never took place, but instead a purported transfer of the shares was made to the appellants who, in turn, executed a trust deed with the second respondent dated 22

July 1985, wherein the appellants acknowledge that they hold the shares as trustees for the beneficiary, the second respondent. A

The balance of the rental amounting to RM13.5m was to be settled by the second respondent through the creation of another trust and by instalments on terms and conditions as specifically set out in cl 4.2 of that agreement. B

Besides the second agreement, the appellants also executed a power of attorney, also dated 18 October 1984, in favour of the first respondent to enable the first respondent to exercise all the rights and powers conferred upon it by the second agreement. This power of attorney was registered with the magistrates' court, Kota Kinabalu, on 23 October 1984. C

The second agreement also had a short life span, as on 30 December 1985, the appellants together with the first and second respondents, rescinded the second agreement by a deed of revocation ('the third agreement'), and they also agreed to revert to the first agreement as being operating and binding upon them. Likewise, the power of attorney dated 18 October 1984, was also revoked and this is evidenced by another deed of revocation also dated 30 December 1985. The reason given for these revocations is that the threat of acquisition of the leased land no longer existed in December 1985, as the state government led by Datuk Harris Salleh was not returned to power following a state election. D

The first agreement also suffered the same fate as the second agreement, as by a fourth agreement dated 20 February 1986, the parties mutually agreed to rescind the first agreement and substitute it with another sublease over the same portion of land to the first respondent. This time, the revocation became necessary as the parties were advised that as the public trustee, the registered owner of the other half of the undivided Karambunai land by virtue of being the administrator of the estate of the grandmother, was not a party to the first agreement and the memorandum of sublease, the two agreements may not be enforceable. Moreover, as the registered owners of only half of the undivided Karambunai land, the appellants could not by themselves register a sublease for a specific portion of the Karambunai land. The land had, therefore, to be demarcated. E F G

As a first step, the public trustee obtained an order of court dated 17 February 1986, allowing the Karambunai land to be demarcated and partitioned into two equal portions of 1,917.5 acres each. Following this, the fourth agreement dated 20 February 1986 was entered into and, in essence, the intentions of the first agreement were maintained. Only this time, the 1,500 acres agreed to be subleased to the first respondent, is confined to the 1,917.5 acres delineated to the appellants. No new memorandum of sublease was executed by the parties under the fourth agreement as they seem to be content to rely on the memorandum registered earlier on 24 November 1984. H I

The appellants' father died on 28 August 1989.

Between 1987–1991, in compliance with the fourth agreement, substantial sums of money were advanced by the third respondent to the

appellants for their education and maintenance and set off as rental due under the sublease.

The next transaction over the Karambunai land took place in 1991, when the appellants:

(1) sold 600 acres of their portion;

(2) leased another two plots covering a total area of 356 acres of their portion for a period of 99 years; and

(3) leased 1,415 acres of the portion that was delineated to the public trustee also for a period of 99 years,

to the first respondent free from all encumbrances and with vacant possession for a total consideration of RM4.8m. The terms and conditions providing for the sale and leases are contained in the fifth agreement dated 19 September 1991. This agreement also provides for the portion delineated to the public trustee to be transferred to the appellants and that transfer was subsequently registered on 5 April 1994.

Then, on 11 July 1992, the appellants executed a supplemental agreement, this being the last of the many agreements that they had executed with the first respondent, varying the terms of payment of the consideration sum under the fifth agreement, by speeding its payment.

The consideration sum of RM4.8m due to the appellants under the fifth and supplemental agreements has been paid fully to the appellants, and the appellants have in turn executed a memorandum of transfer dated 3 November 1993 transferring the 600 acres of the Karambunai land to the first respondent, and this memorandum has been registered on 5 April 1994. Likewise, a memorandum of sublease dated 2 April 1994 to cover all the leased areas pursuant to the fourth agreement dated 20 February 1986, and the fifth agreement dated 19 September 1991 totalling 2,725 acres has also been registered in favour of the first respondent on 5 April 1994. Thus, as at that date:

(1) the only subsisting agreements between the appellants and the first respondent are the fourth, fifth and supplemental agreements, the other agreements having been mutually rescinded;

(2) out of the total area of 3,835 acres that make up the Karambunai land, the appellants are now only beneficially entitled to 500 acres, as the remaining areas have either been sold or subleased by them to the first respondent;

(3) the appellants have been paid a total sum of RM10,856,714.79 by the first respondent to account for all sums due under the memorandum of intent, the first, fourth, fifth and supplemental agreements; and

(4) that the first respondent has already commenced development of the Karambunai land over which they have title, into a world class holiday resort.

It is the appellants' case that they only became aware of the implications of the many agreements they had executed in October 1993

when they were served with the necessary papers of proceedings relating to Originating Summons No K24–124–93 brought by the first respondent against them and another as respondents for a declaration that based on the agreements executed and the advances and loans made to the appellants, the Karambunai lands had become the property of the first respondent. This matter is still pending.

It was following this awareness that the appellants filed the present suit leading to this appeal on 8 June 1994 and in their amended statement of claim, they allege:

(1) that they had been unduly influenced by the third respondent to enter into the many agreements with the first respondent which resulted in their losing the greater portion of their inheritance; and

(2) the deletion of cl 20 of the 1894 Regulations was ultra vires the powers of the fourth respondent.

As such, the appellants seek a rescission of all such agreements, namely, the memorandum of intent, the first, second, third, fourth, fifth agreements, the supplemental agreement, the trust deed and a declaration that they are all void and invalid. As against the fourth respondent, the appellants seek an order to expunge from the register:

(1) the two memoranda of sublease registered on 24 November 1984 and 5 April 1994;

(2) the memorandum of transfer registered on 5 April 1994; and

(3) the reinstatement of cl 20 in Pt III to the annexure to the deed of the lease of the Karambunai land.

In other words, the appellants want to be reinstated into their original status quo so that they are to remain the beneficial owners of the whole of the Karambunai land.

Following the filing of their respective statements of defence, the first to the third respondents jointly and the fourth respondent separately applied to have the appellants' suit struck out under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC'), and under the inherent jurisdiction of the court on the grounds that the amended statement of claim discloses no reasonable cause of action, is frivolous and vexatious and is an abuse of the process of court. Sulaiman J agreed with the respondents and struck out the appellants' suit with costs and hence the present appeal before us.

The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has

no chance of success. (See *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890.)

When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400.) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

It is the appellants' contention that whilst the learned trial judge appreciated the law and procedure governing applications for striking out pleadings under O 18 r 19 and under the inherent jurisdiction of the court, nonetheless he erred when he applied the law to the facts of the case. This is so when he failed to make a critical analysis of the affidavit evidence that was before him, as he did not examine such evidence with a fine tooth comb. Additionally, his finding on the issue of ultra vires is wrong altogether as he had relied solely on the opinion expressed by the Attorney General, which the appellants contend does not bind the learned judge in any way. As the issue is a question of law which requires mature arguments, it must be argued at the trial and not dealt with summarily.

A perusal of the amended statement of claim shows that the appellants' cause of action against the first to the third respondents is founded on the allegation that the third respondent had unduly influenced them into executing the many agreements which they now claim were made without consideration or for purposes that were unlawful. It is for this very reason that they now seek to have such agreements set aside.

The first objection taken by the third respondent is that O 18 r 12(1)(a) of the RHC has not been complied with as there are no particulars of undue influence pleaded in the amended statement of claim.

The answer to this lies in perusing the amended statement of claim in its entirety. Whilst it is true that such particulars have not been itemized by numbering them in order, nonetheless they have been pleaded sufficiently enough at paras 6–10, where there are averments as to how the appellants had befriended the third respondent which led to the third respondent advising, assuring and advancing money to them. The same averment is reflected again in paras 26 and 27 where the appellants refer to the trust and confidence which they had with the third respondent as a result of their friendship with him and the financial advances made by the third respondent. These allegations have all been denied by the third respondent in his reamended statement of defence and likewise at paras 5–7 of his affidavit supporting his application to strike out, and he cannot now at this stage complain that no particulars had been pleaded or that he had no knowledge of them. If indeed such particulars were insufficient, he should have asked for further and better particulars which he had not done.

The principle behind the equitable doctrine of undue influence is expressed most aptly by Lindley LJ in the case of *Allcard v Skinner* (1887) 36 Ch D 145 at pp 182–183 to be as follows:

> Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? In my opinion, the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction ... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

In the Malaysian context, undue influence has been given statutory recognition and it is defined by s 16 of the Contracts Act 1950, and we reproduce the provisions of that section in so far as they are relevant to the facts of this appeal:

> Undue influence
>
> (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ...
>
> (3)(a) Where a person is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other ...

Turning now to the appellants' allegation that they have been unduly influenced by the third respondent to part with the main bulk of the Karambunai land, they rely on the evidence:

(1) that they had no independent legal advice when they executed the various agreements; and

(2) that they were placed in an unequal bargaining power.

To determine this allegation, it is necessary that we go through the circumstances surrounding the execution of each agreement and we start with the memorandum of intent dated 27 August 1982. At that point in

A time the appellants who were only 16 years old, had the benefit of the advice of their legal representatives in the persons of their father and Pengiran Othman. It is the appellants' contention that the legal representatives cannot give them the independent legal advice as one of them, the appellants' father, was already indebted to the third respondent as the latter had promised to settle the estate duty due on their mother's B estate. They contend further that the public trustee, who was then managing their mother's estate, should have been consulted for such legal advice but he never joined in the arrangements.

That we agree would have been the ideal situation but it must be remembered that any move to consult the public trustee should come from C the appellants' father, considering the tender ages of the appellants then. Their father never did so and for that matter neither did Pengiran Othman. As a minister, he must be acknowledged as a man of some good sense and we very much doubt that Pengiran Othman would readily lend his hand in dealings that could work against the appellants' interests but, on the D contrary, his presence and endorsement lend support to our belief that the appellants had all the necessary independent advice that they needed to enter into the memorandum of intent.

If that is not enough, the memorandum was executed by the appellants before an advocate and solicitor, Encik Yussof Ahmad, whose signature appears at p 11 of the memorandum. Although his signature is not identified, E a comparison of it with his signatures appearing at p 25 of the first agreement leaves us in no doubt that the appellants executed the memorandum before an advocate and solicitor and in all probability the appellants must have been legally represented and advised as well.

Two years later, we see the execution of the first agreement dated F 8 March 1984. Like the memorandum of intent, this first agreement was again executed by the appellants in the presence of Encik Yussof Ahmad. That first agreement runs into 25 pages and it is most unlikely that Encik Yussof Ahmad did not explain the contents and implications of such a lengthy document.

G There is also documentary evidence that besides Encik Yussof Ahmad, the appellants had also sought the opinion of another advocate and solicitor, Encik Ansari Abdullah, over the first agreement. That evidence is found in Encik Ansari Abdullah's bill of charges dated 29 May 1986 addressed to the appellants demanding payment for work done which included 'giving opinion on the agreement dated 8 March 1984 executed between yourselves H and Messrs Lipkland (S) Sdn Bhd'.

Seven months after the first agreement was executed, it was replaced by the second agreement dated 18 October 1984 which was executed together with a power of attorney. The reasons for this replacement as we have set out above are not disputed. In this respect, Encik Ansari Abdullah, I before whom the appellants executed the second agreement, had in his affidavit affirmed on 6 October 1994 at para 12 confirmed:

(1) that sometime in early October 1984, he was handed a draft copy of the second agreement together with a power of attorney;

(2) that he explained the terms and conditions of the second agreement and power of attorney to the appellants and also advised them to exclude 417 acres of beach frontage land from the agreement to enable them to develop the same at a later stage with other parties; and

(3) that the appellants had agreed to this exclusion and he was brought to Kuala Lumpur to witness the execution of the second agreement and the power of attorney at the office of the third respondent.

Besides the second agreement and the power of attorney, Encik Ansari Abdullah also admitted witnessing the execution of the third agreement, together with the revocation of the power of attorney, the fourth agreement and the trust deed but denied preparing any of such documents, a denial that is challenged by the third respondent.

Another advocate and solicitor, Mr Billy Lee Chong Hoe, prepared, explained and witnessed the execution of the fifth agreement. It is also not disputed that ten months later, the same solicitor was instructed by one of his partners, Mr Lee Choon Wan, to prepare the supplemental agreement and although he explained the contents of the supplemental agreement to the appellants, its execution was witnessed by Mr Lee Choon Wan instead.

On the face of the contemporaneous documents, there is also the contradicted affidavit evidence of Encik Ansari Abdullah explaining the role he played with regard to the preparation and the execution of the various agreements. Sulaiman J found such affidavit evidence to be unacceptable.

To begin with, Encik Ansari Abdullah had come into the picture in early 1984 when he was instructed by the state government to give his opinion on the arrangements contained in the first agreement. He did so by his letter dated 27 April 1984. At the same time, he was also acting for the appellants as from his own acknowledgement in his bill of charges dated 29 May 1986, he had also given his opinion on the first agreement to the appellants. It is his evidence that he ceased acting for the appellants altogether when he discharged himself by letter dated 7 March 1986, a contention that is disputed by the third respondent who maintains that Encik Ansari Abdullah, despite his express notification to withdraw, never ceased acting for the appellants but continued doing so after 7 March 1986.

Dealing firstly with the execution of the second agreement and the corresponding power of attorney, Encik Ansari Abdullah has denied preparing such documents or any knowledge of the purpose of their execution.

This denial runs contrary to his own bill of charges dated 29 May 1986 and his involvement as a solicitor in this case. His bill of charges has itemised the work he had done for the appellants including 'preparing, attesting and stamping of four copies of the above-mentioned agreement executed between yourselves and Messrs Lipkland (S) Sdn Bhd and a power of attorney for the same executed by yourselves'.

This agreement must refer to the second agreement and the power of attorney that were later revoked by the third agreement and another deed of revocation dated 30 December 1985.

For that matter too, his denial that he was not aware of the true reasons why the second agreement was executed in the first place cannot be believed as he was appraised of all the facts of this case from the very beginning. It must be remembered that he was consulted by the state government and the appellants for his opinion on the first agreement. Before the preparation and execution of the second agreement and the power of attorney, he was again instructed by the state government to prepare a joint venture agreement on terms and conditions dictated by the state government and on his own admission he did prepare such a joint venture agreement which was not acceptable to the appellants' father and the third respondent. It was replaced by the second agreement, which strictly is not a joint venture agreement as such, and the power of attorney. From these events, it is most unlikely that Encik Ansari Abdullah was not appraised of the true reasons for the execution of the second agreement and the power of attorney. By the same token, he must have also prepared the third agreement and the deed revoking the power of attorney as at that point of time he seems to be the only solicitor who was advising the state government, the appellants and the third respondent at the same time. This is clear from the contemporaneous documents that are exhibited to the application to strike out.

The contemporaneous documents also show that Encik Ansari Abdullah was still involved with the appellants after March 1986. Four receipts dated 8 January 1987, 12 January 1987, 15 January 1987 and 29 April 1988, all signed by the appellants, acknowledge that the appellants had received from the first respondent various sums of money which was utilized partly to pay for the air tickets and other expenses of Encik Ansari Abdullah to enable him to come to Kuala Lumpur with the appellants. The fact that such expenses came from the rental payable under the fifth agreement raises a strong inference that the appellants must have continued seeking the advice of Encik Ansari Abdullah in 1987 and 1988.

Perhaps the most telling evidence lies in Encik Ansari Abdullah's letter dated 11 October 1991 written to Mr Billy Lee Chong Hoe, requesting a copy of the fifth agreement. He begins his letter with these opening words: 'We act for Pengiran Ahmad Shah and Pengiran Othman Shah ...'.

Then again on 23 September 1993, following an oral request by Encik Ansari Abdullah for a copy of the supplemental agreement, Mr Billy Lee Chong Hoe wrote to the appellants directly confirming Encik Ansari Abdullah's request, and in that letter Encik Ansari Abdullah is described as the lawyer for the appellants. It would appear from the contemporaneous documents that I have alluded to, that Encik Ansari Abdullah never ceased acting for the appellants despite formally discharging himself in March 1986 and submitting his bill of charges in May 1986.

Finally, we come to the discrepancy found in the affidavit evidence of both Mr Billy Lee Chong Hoe and Encik Ansari Abdullah, with regard to

the receipt of the fifth agreement and two other documents. It is Mr Billy Lee Chong Hoe's evidence that Encik Ansari Abdullah had collected these documents and acknowledged receipt of them whilst Encik Ansari Abdullah states that he never received such documents and could not recall going to Mr Billy Lee Chong Hoe's office to collect them.

Encik Ansari Abdullah's affidavit is affirmed three years after the event but on the face of the contemporaneous documents, this being Mr Billy Lee Chong Hoe's letter dated 11 October 1991 where the acknowledgement is clearly seen, we consider that the trial judge did come to the right conclusion when he placed no weight on Encik Ansari Abdullah's affidavit.

In the light of the documentary evidence, we cannot see how the appellants can contend that they were denied of any independent legal advice when they executed the various agreements. They executed such documents freely and without protest, and this is not a case where the appellants were rushed into executing the documents within a limited span of time but that such execution were done over a period of ten years. They cannot now complain that just because they have been deprived of the main bulk of their inheritance, they had been unduly influenced into entering into contractual obligations which they now say are unconscionable. This is so as they had received consideration for each agreement that they had executed.

As the name implies, the memorandum of intent is nothing more than an expression of the intentions of the parties to enter into a contractual relationship, and in this case that contractual relationship takes the form of a joint business venture where the appellants, on one hand, provided the land for development and the first to the third respondents, on the other hand, the finance and technical know-how. From the very beginning then the parties were on equal footing and there is, therefore, no question of one party dominating the will of the other. Either party can pull out from the proposed joint venture and none will be the poorer. This as we know did not happen. Instead, the appellants went ahead and executed the many agreements that span from 1982–1992. The fact that in 1982 the Karambunai lands were burdened with an estate duty debt, which was eventually settled by the third respondent, does not characterize him as the superior person with a dominating will, as the appellants were fully aware that without the settlement of estate duty, they were deprived of their inheritance and the enjoyment and benefits of the land. The payment of estate duty was part and parcel of their proposed business venture, and was the first consideration that benefited the appellants as the Karambunai land that forms the estate of the mother was vested to the appellants.

The appellants have admitted that with each agreement executed they were compensated either in cash or in kind. As such there has been good consideration given and the appellants have been paid a total of more than RM10.8m.

We now come to the appellants' cause of action against the fourth respondent that he had acted ultra vires his powers when he deleted cl 20 of Pt III of the annexure to the deed of lease.

The Karambunai land has a very interesting history in that it was gifted by the original owner, the Sultan of Brunei, to the appellants' ancestor, Pengiran Abdul Rauf, and when the latter died, the Karambunai land devolved to his son, Pengiran Jalaluddin. Following a revolt and the execution of a treaty on 23 March 1888, with the North Borneo Co, the government of the day, the Karambunai land was ceded to the company conditional upon a title being issued to Pengiran Jalaluddin. That title was issued on 15 November 1905, known as WCC 228, but this was later replaced by the present title deed issued on 16 July 1941. Under the present title deed, the Karambunai land was leased to Pengiran Jalaluddin's daughter, Siti Fatimah, for a term of 999 years effective from 23 March 1898, and subject to the prohibition under cl 6 that it shall not be transferred to an alien or non-native except with the consent of the company. The title deed also specifies that the lease is subject to the 1894 Regulations and a copy of the Regulations is attached to the deed.

The 1894 Regulations is divided into three parts. Part I makes special provisions to country land, Pt II to town and suburban lands and Pt III which incorporates cl 20, contains general provisions as to all lands. The fourth respondent deleted cl 20 and registered such deletion on 3 December 1984, and in substance that clause reads as follows:

> All dealings in land between European and Chinese and other foreigners on the one hand, and the natives of the country on the other hand are hereby expressly forbidden and no such dealing shall be valid or shall be recognized in any court of law unless such dealings shall have been entered into and concluded before the 16th day of January 1883.

The deletion of cl 20 started with the appellants appealing to the then Chief Minister of Sabah, Dato Harris Salleh, through their letter dated 10 September 1984, seeking his approval to direct the fourth respondent to amend the title of the Karambunai land by deleting cl 20. At the same time, the appellants also sought the assistance of the public trustee, who was administering their grandmother's estate to agree to the deletion. That request is contained in the appellants' letter dated 16 November 1984. The public trustee gave his consent and on 26 November 1984, the fourth respondent offered to amend the title of the Karambunai land, an offer that was readily accepted by the appellants and on 3 December 1984, the fourth respondent registered such deletion.

Before us one of the objections taken by the appellants is that the copy of the memorandum of amendment dated 30 November 1984, which enabled the fourth respondent to amend the title, and produced by the appellants at p 657 of the appeal records, differs to the one produced by the fourth respondent at p 453. Whilst both documents relate to the same subject matter, the one produced by the fourth respondent is only a draft which was attached to his letter dated 26 November 1984, the offer to amend. The one produced by the appellants is the completed and final document which was acted upon by the fourth respondent and as such we attach no weight to the objection on the differences between the two documents.

Likewise, we see no merit to the appellants' contention that on the face of the memorandum of amendment, the fourth respondent had acted under s 88 of the Sabah Land Ordinance (Sabah Cap 68) ('the SLO') to effect the deletion. Clearly, any reference to s 88 is wrong as the provisions of that section have no relevance to the fourth respondent's power to amend. Section 88 relates to indefeasibility of title by way of registration.

When the Karambunai land was first alienated to the appellants' ancestor, the relevant legislation in force was the 1894 Regulations, which contained the impugned cl 20. However, cl 21 does make provision for the acquisition of such land by non-natives through the government who would purchase such land and lease the same to non-natives at a premium.

The 1894 Regulations was only a subsidiary legislation enacted under Proclamation No III of 1894. On 1 April 1904, Proclamation No XXIII of 1903 repealed and replaced Proclamation No III of 1894 and with it, the 1894 Regulations as well. Thus, when the Karambunai land was alienated to Pengiran Jalaluddin on 15 November 1905, the relevant legislation in force was the 1903 Proclamation which preserved cll 20 and 21 of the 1894 Regulations at ss 26 and 27.

The 1903 Proclamation was in turn repealed by Ordinance 7 of 1913 which also preserved the provisions of cll 20 and 21 of the 1894 Regulations at ss 28 and 29.

Ordinance 7 of 1913 was later repealed by the Land Ordinance 1930 where provisions similar to cl 20 of the 1894 Regulations have been preserved by s 17(i). The Land Ordinance 1930 was subsequently revised and reprinted by the SLO which is the current legislation regulating the alienation and occupation of state lands in Sabah. It also classifies such lands as town lands, country lands and lands with native titles and it also retains similar provisions of the impugned cl 20 at s 17.

It is the appellants' contention that since the Karambunai land was originally alienated by treaty, it does not fall within any of the class of titles under the SLO, but that it is still subject to the 1894 Regulations. As it constitutes a class of its own, the only way it can be acquired by a non-native is for the government to acquire the land on behalf of the non-native, and to have the same leased to the non-native on payment of a premium. To that end, what was done by the fourth respondent in amending the title by deleting cl 20 was illegal as he had no power to do so.

The historical background of the title to the Karambunai land serves as a complete information as to how the land came to be owned by the appellants' family. It also serves as a better understanding of the feelings of loss and frustration experienced by the appellants when they realized that they had parted with the main bulk of their inheritance.

Besides that, the historical background can do no more as the title must be appraised in its present form and in the light of the relevant laws applicable to it.

A perusal of the title at pp 426–433 of the appeal records shows that the restriction placed by cl 20 is not incorporated as a numbered condition in the title itself but that the whole of the 1894 Regulations which contained the impugned cl 20 is attached to the title. This is most unusual, and if it is intended that it shall have statutory force, then it ceased to have such effect when the 1894 Regulations was repealed in 1904.

The fact that there is a reference to cl 20 by attaching the whole of the 1894 Regulations to the title must be intended to mean something. Since another legislation has replaced and repealed the 1894 Regulations, the only inference that we draw is that the reference to cl 20 in the title can only mean that it was intended to be another condition to the title, although the manner of incorporating that additional condition has been done in the most unusual way.

On the face of the title, there is nothing to suggest that it is a native title, which under s 4 of the SLO has been defined to mean 'an entry in the native title register or in the field register under Pt IV'. A perusal of the title shows it to be nothing more than a lease for which the lessor, the British North Borneo Co, had leased the Karambunai land to the lessee, Pengiran Siti Fatimah bte Pengiran Jalaluddin, the appellants' ancestor for a term of 999 years with effect from 23 March 1838 subject to the six terms and conditions expressed therein and the provisions of cl 20 which is attached to the title. It is interesting to note that condition 6 also restricts any transfer to an alien except with the consent of the company but it is quite unlike the provisions of cl 20 which speaks of absolute restraint altogether.

Being just another additional condition, can it be deleted by the consenting parties to the lease, who are now the successors in title? Secondly, can such consent empower the fourth respondent to effect such deletion? We answer both questions in the affirmative.

All the contemporaneous documents executed by the appellants leading to the amendment to the title indicate an expression of free will and absence of any coercion of any kind. The appellants were represented by Encik Ansari Abdullah who had witnessed their signatures in the offer of amendment and the memorandum of amendment both dated 26 November 1984. Since the parties have consented to delete a term of their contractual obligations, the fourth respondent was doing nothing more than to act on such a consent when he deleted cl 20. He derived his powers from such a consent and he cannot be faulted for this, particularly when the title of the land does not fall into any of the three classes of lands identified by the SLO.

There is an abundance of documentary evidence produced in this appeal and there is no allegation from anybody that any of the documents is false. From our assessment of these documents and the affidavit evidence available, the appellants have failed to establish their allegation of undue influence. The third respondent's lengthy affidavit in support of the application to strike out has not been sufficiently replied by the appellants

in their affidavit in reply. Instead, Encik Ansari Abdullah's affidavit was relied upon by them to fill in the gap but as we have indicated above there are too many material discrepancies in his affidavit when viewed against the many contemporaneous documents and to that end we endorse the learned trial judge's conclusion that no weight be given to it.

As for the issue of law raised against the fourth respondent, since that can be determined from the undisputed documentary evidence, a trial of the action will not add anything more to what has already been canvassed before the trial judge and before us. If anything at all, if this suit proceeds to trial it will be with the hope that something may turn up at the trial but in the light of the affidavit and documentary evidence, we found that the respondents have no case to answer.

Appeal dismissed.

Reported by Angela Ho